(4)

No. 04-603

OCTOBER, 2004 TERM

GRABLE & SONS METAL PRODUCTS, INC.,
A Michigan corporation,

Petitioner,

v.

DARUE ENGINEERING & MANUFACTURING,
A Michigan corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORI

A. Introduction.

Pursuant to Rule 15.6 of the Rules of the Supreme Court of the United States, the Petitioner may file a reply brief to address new points raised in the Brief in Opposition. In addition, Rule 15.2 admonishes counsel that misstatements of fact and law should be addressed at the petition stage or they will be deemed waived. Accordingly, Petitioner herein sets forth its reply addressing several new points raised through misstatements of fact and law made in Respondent's Brief in Opposition.

B. United States Not a Party to For Establishing Original Jurisdiction.

The first issue raised by the Petitioner Grable addresses the question of whether there was a substantial federal question to give removal jurisdiction to the district court in state quiet title action. On page 10 of its Brief in Opposition Respondent Darue raises a new point regarding the subject matter jurisdiction issue. Respondent claims that the jurisdiction issue in this case is now moot. The claim of mootness is based on Respondent's erroneous conclusion of the consequences of its attempt to interplead the United States as a party. According to Respondent, the United States is a party by virtue of 28 U.S.C. §2410. Consequently, pursuant to 28 U.S.C. §§ 1340 and 1346, the district court did have original jurisdiction and the issue of jurisdiction is moot. The facts of the case and the law belie Respondent's erroneous contention.

This case was originally a quiet title action filed in the State of Michigan. Respondent removed it to the United States District Court for the Western District of Michigan by. The issue of jurisdiction arose via

Petitioner's motion to remand and the district court's subsequent denial of its motion.

The United States was not a party in the original filing. The United States only named as a third-party to the action when respondent erroneously attempted to bring in the government as a third-party. The United States filed a motion to dismiss the third-party complaint for lack of jurisdiction, in that sovereign immunity had not been waived. The Honorable David W. McKeague declined to immediately address the motion to dismiss. The third-party complaint was eventually dismissed as moot without the court having addressed the merits of the government's claims of lack of jurisdiction. The law, however, dictates that the United States was not a proper party to this case. Thus, as a matter of law, the naming the government as a third-party in this case did not make them a party in the case for the purpose of establishing federal jurisdiction..

28 U.S.C. §2410 is the foundation of Respondent's claim that the United States should be a party to this quiet title action. §2410(a) states in pertinent part,

> Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter – (1) to quiet title; ... or (5) of interpleader or in the nature of interpleader with respect to, real or personal property on which the United States has or claims a mortgage or other lien.

There is a key prerequisite that Respondent fails to comprehend by insisting that the United States is a party. That crucial element is that the United States must claim a mortgage or other lien on real property. In this case the government specifically denied that it had a claim or other

interest in the property subject to the quiet title action. The lone case cited by Respondent as an alleged authority for the government being a party is *Aqua Bar & Lounge, Inc. v. United States Dept. of Treasury*, 539 F.2d 935 (2d Cir. 1976). Even the quotation from *Aqua Bar* by Respondent refers to the requirement that there must be a lien claimed by the United States. Since the United States did not have a lien, neither does it claim any other interest, neither section 2410 nor *Aqua Bar* give any foundation for the United States being a party. In short the government was never a proper party, let alone a necessary party as claimed by Respondent.

Respondent's reliance on 28 U.S.C. §§1340 and 1346 is predicated on §2410. Without §2410 sections 1340 and 1346 also fail to give jurisdiction.

Accordingly, because the United States specifically stated that it did not claim any lien or other interest in the subject property, the Supreme Court should ignore the new point raised by Respondent that the jurisdiction issue is moot because the United States is a party.

C. New Points Raised Through Misstatement of Facts.

One of the crucial factual elements of the second issue raised by Petitioner is whether the IRS complied with the personal service provisions of the notice requirements contained in 26 U.S.C. §6335(a).

At the District Court level the relevant facts of the case were stipulated by the parties prior to submission of the issues. No evidentiary hearing was held. Thus, no evidence, other than that stipulated, was admitted. Based on the evidence agreed upon by the parties the Honorable Judge David W. McKeague found that, "The relevant facts are not disputed," Pet. App C, at page 15. Furthermore, Judge McKeague also found that, "The United States conceded that the conditions prerequisite to authorized

service by mail were not met," Pet. App. C, at page 16. The 6th Circuit decision also acknowledged the undisputed nature of the facts by stating, "The parties agree that the IRS failed to adhere to the exact provisions of the statute ... ," Pet. App. At page 3.

Darue now alleges new and inconsistent facts that have not been made a part of the record. This impropriety is inserted via footnotes 3# 1, 2, and 3 accompanying the Factual History on pages 2 and 3 of the Respondent's Brief in Opposition. Respondent introduces contradictory factual statements in footnote #2 which reads,

> During the Rule 16 Scheduling Conference, the Tax Division Attorney stated that an agent went to Grable's home to personally serve him the notice of seizure on his property but was unable to serve Grable. Thereafter, the agent sent the notice by certified mail. There was also considerable testimony in the hearing before Judge Quist on the United States Marshal's attempts to serve Grable with an order for entry to seize assets. The Grables routinely refused to answer the door and even closed a window on one of the Marshal's hands.

The facts alleged in footnote #2 were not a part of the record in the district court. These facts were never 'proven' or offered as evidence. Furthermore, from the language in the footnote referring to Judge Quist and to a US Marshal, it is more likely that these hearsay statements may have been made during a Rule 16 Scheduling Conference in another case in which Grable may have been personally involved., rather than in this case. Language that lends further support to this view that the Rule 16 Scheduling Conference may not have been in this case is found in the phrase, "the Tax Division Attorney stated that an agent went to Grable's home to personally serve him the notice of seizure on ***his*** property but was

unable to serve Grable. Grable had other cases where he was personally involved. But in this case, 'Grable' represents a corporation. Thus, an agent could not have attempted to serve a notice of seizure on ***his*** property.

The improper introduction of this 'new evidence' tends to cloud the issue of whether the IRS substantially complied with the notice provisions requiring personal service or leaving the notice at the place of residence or business. The IRS was never required to prove that it attempted, but was unable, to personally serve Grable. If such were the case then the backup service through certified mail might very well have been proper. Nevertheless, the stipulated evidence did not include an attempt to personally serve the required notice.

The facts were stipulated before the district court and an attempted personal service was not among the facts agreed upon. To introduce unverifiable and unrecorded facts at the Supreme Court level is highly improper and should be ignored by the Court.

The same is true of the allegations made by Respondent in footnotes #1 and 5 of its Brief in Opposition. An additional observation is that the history of the Grable family is not at issue in this case, only facts relating to the corporation of Grable & Son Metal Products, Inc. have any bearing on the issues presented to the Court. In footnote #5 Respondent refers to Appendix C as authority to suggest that Grable owes the government over 2 million dollars in taxes. Appendix C contains no such statement. Those allegations calling attention to facts not in evidence, or matters in other cases should be ignored by this Court.

D. Conclusion.

Respondent does not want the two issues raised by Petitioner heard by the Supreme Court so it must attempt to direct the Supreme Court's attention away from the

relevant facts by introducing the new points of the United States being a party and new facts not in the record.

As a further example of its desperate attempt to prevent a writ of certiorari from being granted, Respondent boldly states on page 18 of its Brief in Opposition, "There are no splits in the circuit[s] regarding I.R.C. §6335." This is a complete contradiction to the view held by the district court. There the court found, "Plaintiff's claim finds support in the case law." Pet. App. C at page 16. Judge McKeague thereafter lists five cases that he felt tended to support Grable's view of the requirement strict compliance relating to 26 U.S.C. §6335(a) notice provision. Three of these cases are from three different circuits of the United States Appeals Courts. They are, *Goodwin v. United States*, 935 F.2d 1064 (1991); *Kulawy v. United States*, 917 F.2d 729 (2nd Cir. 1990); and *Reese v. Scoggins*, 506 F.2d 967, 969 (5th Cir. 1975). The sole circuit case relied on by Judge McKeague was *Kabakjian v. United States*, 267 F.3d 208 (3rd Cir. 2001). There is indeed a split among the circuits.

No introduction of new points including misstatement of facts and allegations improper parties should prevent this Court from visiting the issues presented by Petitioner. This Court must accordingly grant the Petition for a Writ of Certiorari.

For the foregoing reasons, the new points raised by Respondent should be ignored and the Petition for a Writ of Certiorari should be granted.

Dated December 11, 2004

Respectfully submitted

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